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Nos. 96-552 and 96-553

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

RACHEL AGOSTINI, *et al.*,
Petitioners,

v.

BETTY-LOUISE FELTON, *et al.*,
Respondents.

CHANCELLOR OF THE BOARD OF EDUCATION
OF THE CITY OF NEW YORK, *et al.*,
Petitioners,

v.

BETTY-LOUISE FELTON, *et al.*,
Respondents.

On Writ of Certiorari To The United States
Court Of Appeals For The Second Circuit

BRIEF *AMICUS CURIAE* OF UNITED STATES SENATOR ROBERT F. BENNETT IN SUPPORT OF PETITIONERS

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34 pp

EDITOR'S NOTE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

OTHER AUTHORITIES:

IN THE

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INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 37.3 of this Court, Senator Robert F. Bennett submits this brief *amicus curiae* in support of Petitioners. Consent to the filing of this brief has been granted by all parties. Copies of the letters of consent have been lodged with the Clerk.

This case raises momentous questions regarding the status and future direction of Establishment Clause jurisprudence. As a Member of the United States Senate, Senator Bennett has a keen interest in the evolution of legal doctrine that affects the rights of religious individuals and religious institutions in American society. We believe this perspective will complement the briefs of the parties and assist the Court in the proper resolution of this case.

SUMMARY OF ARGUMENT

Although *Lemon v. Kurtzman* today stands as a controversial symbol of government hostility to religion, its three conceptual prongs were not intended to prohibit government aid to religion or to enforce the separation of church and state. Rather, this analytical framework was designed to protect "religious voluntarism"— the idea that individual religious choice should be insulated from the influence of noncoercive government action that encourages or discourages religious belief or activity. "Secular purpose" and "primarily secular effect," for example, were well established doctrinal elements of Establishment Clause jurisprudence prior to *Lemon*, and were consistently applied to protect religious voluntarism. In the single pre-*Lemon* decision in which it was used, the relatively new concept of "entanglement" was likewise employed to protect religion from government, *not* government from religion. Even the Court's post-*Lemon* decisions permit substantial financial and in-kind aid to religion so long as such aid does not bias the choice between religion and nonreligion.

Entanglement analysis went wrong almost from its initial use in *Lemon*, threatening religious voluntarism without offering any compensating protection. Instead of being deployed to protect individual religious choice, entanglement has become an independent constitutional value that has calcified the division between church and state, even when the separation undermines

voluntarism. The consequences of this doctrine gone awry are gravely disturbing. Entanglement is routinely used to deny religious individuals and organizations equal access to social benefits in violation of the religious neutrality otherwise mandated by the Court's Establishment Clause jurisprudence. Entanglement exacerbates the tension between the Free Exercise and Establishment Clauses by casting doubt on the legitimacy of exemptions obtained by individuals and organizations through the political process. Moreover, entanglement ironically leads to discrimination on the basis of religion in violation of the Equal Protection Clause of the Fourteenth Amendment. Finally, entanglement deprives religious individuals and organizations of fundamental political and associational rights protected by the First Amendment.

The tragedy in all of this is that entanglement analysis has such negative consequences while contributing so little to Establishment Clause jurisprudence. In many cases, entanglement merely mimics the protection of religious voluntarism offered by the purpose and effect prongs of *Lemon*. It avoids analytic redundancy only by relying on caricatures of religious schools that are frequently unsupported by the factual record, and engaging in standardless judgments based on hypothetical facts. The case at bar vividly illustrates the dangers of applying entanglement as a test of Establishment Clause constitutionality independent of religious voluntarism. In light of its deficiencies, the entanglement prong should be dropped as a test of constitutionality under the Establishment Clause.

ARGUMENT

I. THE THREE-PRONGED TEST OF *LEMON V. KURTZMAN* WAS DESIGNED TO PROTECT RELIGIOUS VOLUNTARISM, NOT TO PROHIBIT ALL GOVERNMENT AID TO RELIGION OR TO ENFORCE THE SEPARATION OF CHURCH AND STATE AS AN INDEPENDENT VALUE.

Religious voluntarism is the principle that the popularity and vitality of any religious activity should depend on the intrinsic attractions of the activity to its adherents, and not on the extrinsic effects of government encouragement or opposition. Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development—Part II: The Nonestablishment Principle*, 81 HARV. L. REV. 513, 517 (1968). A doctrinal regime committed to religious voluntarism seeks to "minimize the effect [government] has on the voluntary, independent religious decisions of the people as individuals and in voluntary groups." Thomas Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 695, 706 (forthcoming March 1997); *accord*, Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001 (1990).

This Court has long recognized that religious voluntarism is the fundamental purpose of the religion clauses.[1] A commitment to

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[1] *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970) (The purpose of the religion clauses "is to insure that no religion be sponsored or favored, none commanded, and none inhibited."); Zorach v. Clauson, 343 U.S. 306 (1952) ("We sponsor an attitude on the part of government that shows no partiality to any one [religious] group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma."); Engel v. Vitale, 370 U.S. 421, 429 (1962) ("[E]ach separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for

religious voluntarism is also the undoubted source of the Court's insistence that government remain neutral with respect to the religious choices of its citizens,[2] because "neutrality reduces (and in theory eliminates) the impact that governmental action has upon individual choice with respect to religion." Michael W. McConnell & Richard Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 11 (1989); *see also Walz*, 397 U.S. at 696 (Harlan, J., concurring) (Government action that "neither encourages nor discourages religion . . . satisfies the voluntarism requirement of the First Amendment.").

Religious voluntarism is violated by government persuasion as much as by government coercion. Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1002 (1990). Thus, whereas the Free Exercise Clause protects individual religious choices from purposeful religious coercion by government, *see, e.g., Church of the Lakumi Babylu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the Establishment Clause protects these choices from government actions that have the purpose or primary effect of encouraging or discouraging religion, even when the government has not used its coercive power directly to mandate or to prohibit religious belief or practice. *Engel v. Vitale*, 370 U.S. 421, 430-31 (1962).

A. Prior to their incorporation into the *Lemon* test, "secular purpose" and "primarily secular effect" were well-established doctrinal tests meant to protect religious voluntarism.

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religious guidance.").

[2] *See, e.g.*, Grand Rapids School Dist. v. Ball, 473 U.S. 373, 382 (1985); Everson v. Board of Educ., 330 U.S. 1, 14-15, 15-16 (1947).

Although *Lemon v. Kurtzman* was the first decision of the Court to combine secular purpose, primarily secular effect, and entanglement into a single test, *see* 403 U.S. 602, 612-13 (1971), only entanglement was a new analytical concept, having been articulated just the preceding Term. *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970). By contrast, a full eight years before *Lemon*, the Court had synthesized its entire body of Establishment Clause precedent since *Everson* into the requirement that government action have "a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Abington School Dist. v. Schempp*, 374 U.S. 203, 222 (1963) (*citing McGowan v. Maryland*, 366 U.S. 420, 442 (1961); *Everson v. Board of Educ.*, 330 U.S. 1 (1947). *Board of Education v. Allen* approved *Schempp*'s test of constitutionality under the Establishment Clause, 392 U.S. 236, 242-43 (1968), and *Lemon* cited *Allen* as authority for adopting purpose and effect as two of its three doctrinal prongs. *See Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

1. Prior to *Lemon*, secular purpose and primarily secular effect were consistently applied to insulate individual religious choice from the influence of noncoercive government action.

The three pre-*Lemon* decisions that found violations of the Establishment Clause all involved public school programs which encouraged but did not require student participation in religious teaching or practice. In *McCollum v. Board of Education*, the Court invalidated a program which authorized priests, ministers, and rabbis to use public school classrooms for religious instruction of interested students, finding that even voluntary on-campus religious instruction impermissibly relied on compulsory education laws to assist religious groups in the propagation of their faith. 333 U.S. 203, 209-10 (1948). In *Engel v. Vitale*, the Court found that classroom recitation of a state-authored prayer

at the beginning of each school day was "wholly inconsistent" with the Establishment Clause, even though students could choose not to participate. 370 U.S. at 421, 423 & n.2, 430. "The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American public can say. . . ." *Id.* at 429. In *Abington School District v. Schempp*, the Court invalidated formal classroom recitations from the Bible, again deeming it irrelevant that students were excused from participating in the exercises. 374 U.S. 203, 223-25 (1963). The Court found that even in the absence of direct coercion, Bible reading could not plausibly be characterized as having a primarily secular effect that neither aided nor opposed religion. *Id.* at 223.

Decisions of the Court upholding programs of assistance to religion prior to *Lemon* were also principally concerned with preserving religious voluntarism. *See, e.g., Board of Education v. Allen*, 392 U.S. 236, 243-44 (1968) (textbook loan program benefitting religious school students did not violate the Establishment Clause because books were provided free of charge to all students upon their request, regardless of the public, private, or religious character of their schools); *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) (state authorization of voluntary off-campus released-time religious instruction was merely permissible state cooperation "in a religious program to the extent of making it possible for . . . students to participate in it.").

2. The single pre-*Lemon* decision that employed the concept of entanglement likewise focused on the protection of individual religious choice from noncoercive government action.

Walz v. Tax Commission held that property tax exemptions for churches were consistent with the Establishment Clause because exemptions minimized church-state "entanglement"— that is, the government interference in religious practice that would inevitably result from "tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of these legal processes." 397 U.S. 664, 674 (1970). The chief rationale was the curtailment of religious liberty that historically has accompanied taxation of churches. *Id.* at 673. In *Walz*, entanglement was envisaged as preventing government's use of the "regulatory strings attached to powerful financial benefits" to exercise control over a religious group's "beliefs, policies, or actions." Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV 311, 346 (1986).

C. The Court's post-*Lemon* decisions permit substantial financial and in-kind aid to religion so long as such aid does not bias the choice between secular public schools and private religious schools.

1. Indirect aid to religious schools and other "pervasively sectarian" institutions is permissible if directed to students and their parents pursuant to broad, secularly defined benefit categories.

The Court has long presumed that religious elementary and secondary schools exist primarily to inculcate their students with the beliefs of the sponsoring faith, and thus that the sponsor's religious beliefs and practices pervade every aspect of the schools' activities. *See, e.g., Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 379 (1985); *Meek v. Pittenger*, 421 U.S. 349, 366 (1975); *Lemon v. Kurtzman*, 403 U.S. 602, 613, 615-16, 620 (1971). Accordingly, the Court has generally held that financial

or in-kind aid given directly to religious schools and other such "pervasively sectarian" institutions advances religion in violation of *Lemon*'s primary secular effect prong. *See, e.g., Grand Rapids*, 473 U.S. at 385; *Meek*, 421 U.S. at 366; *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 779-80 (1973). By contrast, when aid is given directly to religious school students or their parents pursuant to broad, secularly defined classes, the Court has generally found no Establishment Clause violation. *See, e.g., Zobrest v. Catalina Hills School Dist.*, 509 U.S. 1 (1993); *Mueller v. Allen*, 463 U.S. 388 (1983); *Board of Educ. v. Allen*, 392 U.S. 236 (1968); *Everson v. Board of Educ.*, 330 U.S. 1 (1947); *cf. Witters v. Dept. of Servs. for the Blind*, 474 U.S. 481 (1986) (declining to invalidate state vocational rehabilitation assistance used by a visually handicapped student to study for the ministry at a Bible college).

Even though aid to students and parents obviously assists any religious school which the students might attend, the Court's opinions make clear that such aid does not result in a primary effect of advancing religion, because the aid is received by religious schools only as the result of the individual religious choices of students and parents. *See, e.g., Zobrest*, 509 U.S. at 10, 13-14; *Mueller v. Allen*, 463 U.S. 388, 399-400 (1983); *cf. Witters*, 474 U.S. at 487, 488 (when recipient of state vocational rehabilitation assistance chooses to study for ministry at Bible college, the college benefits only as the result of the recipient's religious choice).

In sum, although financial and in-kind assistance to students attending private religious schools benefit these schools, such assistance does not violate the Establishment Clause because the schools receive the benefits only as individual recipients choose to attend them. In these circumstances, financial or in-kind aid funds the private choices of individuals (including religious individuals), and only incidentally the educational institutions

(including religious schools) that are the beneficiaries of these choices. *See* Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development—Part II: The Nonestablishment Principle*, 81 HARV. L. REV. 513, 585 (1968). As demanded by religious voluntarism, this ensures that religious schools and other pervasively sectarian institutions in the United States exist as the consequence of the private choices of religious individuals rather than the collective choices of government.

2. Direct aid to religious schools and other pervasively sectarian institutions is permissible so long as there is no possibility that such aid could be diverted to encourage religious belief or practices.

Although the Court regularly emphasizes the importance of the individual-institutional distinction to the constitutionality of religious school aid programs, *e.g.*, *Mueller v. Allen*, 463 U.S. 388, 399 (1983); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 780-81 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 621 (1971); *Board of Educ. v. Allen*, 392 U.S. 236, 243-44 (1968), it nevertheless has upheld both cash and in-kind assistance given directly to religious schools when there is no possibility that the aid could be used to promote religious belief or practice. *Wolman v. Walter*, 433 U.S. 229 (1977), considered, among other programs, a state's practice of administering and grading required achievement tests free of charge for religious school students. The Court held that since the religious schools controlled neither the content of these tests nor their results, the tests could not be used to teach religion in violation of the primary effect prong; and that, correspondingly, there was no need for close government monitoring of religious school teaching that would violate the entanglement prong. *Id.* at 240-41.

In *Committee for Public Education v. Regan*, 444 U.S. 646 (1980), the Court even upheld cash reimbursements to religious schools for expenses incurred in using their own employees to administer and grade state-mandated tests. The Court again concluded that these tests could not be used to teach religion because state employees prepared them and the objective nature of the test questions ensured that religious considerations would not influence grading. *Regan*, 444 U.S. at 654-56 (*quoting Wolman v. Walter*, 433 U.S. 229, 240 (1977)). The Court further held that record-keeping and reporting requirements mandated by the program would ensure that reimbursements were made only for secular services, and that these requirements did not constitute an excessive entanglement of the state with religious schools. 444 U.S. at 659-61.

3. Direct aid to religious colleges and other "nonpervasive" religious institutions is permissible when it is part of a secular social welfare program.

In religiously sponsored colleges the secular goal of teaching critical thinking by secular academic methods is thought to eclipse the religious goal of inculcating sectarian beliefs and practices. *See Roemer*, 426 U.S. at 750, 751 (plurality opinion); *Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971) (plurality opinion). Additionally, the relative age and maturity of college students compared to students in elementary and secondary schools makes it unlikely that college students will be manipulated into adopting particular religious beliefs or practices encouraged by a religious college. *See Roemer v. Maryland Bd. Pub. Works*, 426 U.S. 736, 750 (1976) (plurality opinion); *Tilton*, 403 U.S. at 685-86 (plurality opinion). For both of these reasons, the Court has concluded that, in contrast to religious elementary and secondary schools, religious colleges are generally not "pervasively sectarian." *Roemer*, 426 U.S. at 758-59 (plurality opinion); *Tilton*, 403 U.S. at 681, 687 (plurality

opinion). *See also Bowen v. Kendrick*, 487 U.S. 589, 610-11 (1988) (Adolescent Family Life Act did not facially violate Establishment Clause by permitting grants to religiously sponsored social service agencies along with secular agencies, when only a small percentage of eligible grant recipients were likely to be "pervasively sectarian."

In upholding the constitutionality of financial aid to religious colleges, the Court emphasized the pervasiveness of government aid in contemporary society. *See, e.g., Roemer*, 426 U.S. at 745 (plurality opinion). If most colleges are receiving government aid, neutrality does not require that otherwise eligible religious colleges be denied aid solely because of their religious affiliation.[3]

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[3] *Roemer*, 426 U.S. at 747 (plurality opinion); *cf. Bowen*, 487 U.S. at 595-96, 608-09 (federal law authorizing cash grants to religious as well as secular social service agencies for pregnancy counseling does not violate establishment clause because "nothing on the face of the Act suggests it is anything but neutral with respect to the grantee's status as a sectarian or purely secular institution"); *Walz* v. Tax Comm'n, 397 U.S. 664, 671 (1970) (property tax exemption for churches "along with nonprofit hospitals, art galleries, and libraries" was equivalent to supplying churches the same police and fire protection provided to everyone else). *See also* Board of Educ. v. Grumet, 114 S.Ct. 2481, 2491 (1994) ("[W]e have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges."); Zobrest v. Catalina Hills School Dist., 509 U.S. 1, 8 (1993) ("[W]e have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit."); Board of Educ. v. Allen, 392 U.S. 236, 242 (1968) ("[T]he Establishment Clause does not prevent a State from extending the benefits of state laws to all citizens without regard for their religious affiliation. . . ."); Everson v. Board of Educ., 330 U.S. 1, 16 (1947) ("[The state] cannot exclude individual Catholics, Lutherans, Mohammedans, or members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.")

II. "ENTANGLEMENT" ANALYSIS THREATENS RELIGIOUS VOLUNTARISM AND OTHER FUNDAMENTAL CONSTITUTIONAL VALUES WITHOUT OFFERING ANY COMPENSATING PROTECTION.

The Court has distinguished two kinds of church-state entanglement which run afoul of the Establishment Clause. "Administrative" or "institutional" entanglement describes church-state relationships in which the government monitoring thought necessary to ensure that government aid not be used to advance religion, is itself so intrusive as to constitute an independent violation of the Establishment Clause. Edward McGlynn Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U.L.J. 205, 211 (1980). Government monitoring of teachers in religious elementary and secondary schools to ensure that they are not advancing religion is the paradigm case of excessive administrative entanglement. *See, e.g., Aguilar v. Felton*, 473 U.S. 402 (1985); *Meek v. Pittenger*, 421 U.S. 349, 369-70 (1975); *Lemon v. Kurtzman*, 403 U.S. 602, 617-19, 620-22 (1971). In fact, the Court has never found excessive administrative entanglement to exist outside the context of financial aid to religious schools.

"Political" entanglement describes church-state relationships likely to cause "[p]olitical fragmentation and divisiveness on religious lines." *Lemon*, 403 U.S. at 623. Cash subsidies to parochial schools are thought to create political entanglement because of the risk of yearly budget battles in which political opponents are distinguished principally by denominational affiliation or lack thereof. *Id.* at 622. The Court has confined political entanglement to cases involving direct cash subsidies to religious schools or their teachers, *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 339 n.17 (1987); *Mueller v.*

Allen, 463 U.S. 388, 403 n.11 (1983), and has further suggested that it is not an independent test of constitutionality under the Establishment Clause. *See Lynch*, 465 U.S. at 684-85; *id.* at 689 (O'Connor, J., concurring).

A. The development of entanglement as an independent test of constitutionality has threatened religious voluntarism and legitimized violation of the fundamental constitutional rights of religious individuals and groups.

Numerous commentators have observed that the "separation of church and state" is not an independent constitutional value, but merely a means by which religious liberty is protected. *See, e.g.*, STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 107 (1993); KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS 67 (1995). Voluntarism is thus a more fundamental constitutional value than separation. LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, §14-11, at 1160 (2d ed. 1988); *cf.* KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS 67 (1995) ("[R]eligious liberty is considered *more fundamental* than nonestablishment.") Indeed, the Court has affirmed that religious voluntarism is the fundamental purpose of the Establishment Clause,[4] while rejecting the notion that total separation of church and state is either possible or desirable.[5]

Consistent with this view of voluntarism as the fundamental Establishment Clause value, *Walz* envisaged entanglement

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[4] *E.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970); Zorach v. Clauson, 343 U.S. 306, 312 (1952); Engel v. Vitale, 370 U.S. 421, 429 (1962).

[5] *E.g.*, Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 760 (1973); Lemon v. Kurtzman, 403 U.S. 602, 614 (1971), *quoted with approval in* Lynch v. Donnelly, 465 U.S. 668 (1984); *Walz*, 397 U.S. at 670; *Zorach*, 343 U.S. at 312, *quoted with approval in Walz*, 397 U.S. at 669.

analytic tool for identifying situations in which the choices of religious individuals and organizations might be exposed to the distorting influence of government encouragement or discouragement of religion. *See* Part I.A.2 *supra*. *Lemon*, however, cut entanglement loose from its mooring to voluntarism. Freed from that constraint, entanglement developed as a doctrine that enforces church/state separation not simply independent of religious voluntarism, *but at its expense*. In the name of "separation of church and state," entanglement has devalued religious voluntarism and legitimized government deprivation of religious liberty and other fundamental constitutional rights of religious individuals and groups.

1. In a modern welfare state, use of administrative entanglement to deny government aid to religious schools violates the religious neutrality mandated by the Establishment Clause.

Two hundred years ago, when government taxation and subsidies were uncommon and insignificant, merely separating church and state was a viable strategy for achieving religious neutrality. Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 NOTRE DAME L. REV. 581, 639 (1995). A constitutional doctrine that preserved religious neutrality by prohibiting aid to both religion and nonreligion was eminently feasible "in a country with no public education, no public transportation, no public health and safety programs — in short, a libertarian, caretaker state." John Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83, 99 (1986). Neutrality meant simply leaving religion alone, neither taxing it nor subsidizing it. Esbeck, 70 NOTRE DAME L. REV. at 639; Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development—Part II: The Nonestablishment Principle*, 81 HARV. L. REV. 513, 522 (1968).

In an age, however, when our government taxes and funds virtually every aspect of American life, "simply leaving religion alone" imposes disproportionate financial burdens on religious beliefs and practices, violating religious neutrality and undermining religious voluntarism. Esbeck, 70 NOTRE DAME L. REV. at 639; Giannella, 81 HARV. L. REV. at 525-26; Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001 (1990); Michael W. McConnell & Richard Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 11 (1989). "Older views stressed governmental abstention as a condition (if not the substance) of freedom, [b]ut increasingly, affirmative governmental intervention is invoked to provide resources and opportunities for desired freedoms." Marc Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 WIS. L. REV. 216, 268.

In the modern welfare state that the United States has become, many persons and entities receive some kind of government aid. Religious neutrality requires that this aid not be denied to otherwise qualified recipients simply because they are religious. "[R]eligious organizations should be able to compete on the same grounds as other groups . . . they should not, on Establishment grounds, be relegated to second-class status." STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 121 (1993). To deny aid to otherwise qualified religious recipients constitutes a tax on religious exercise which undermines voluntarism by skewing private choice away from religion. Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 355 (1986).

This is particularly the case with respect to elementary and secondary education in the United States. Public schools are supported by local tax dollars supplemented, in most cases

substantially, by state and federal grants. Parents of religious school students are not permitted to opt out of paying these taxes, and in very few states are they entitled to any tax relief, despite the fact that they save local, state, and federal governments thousands of dollars by educating their children privately. Jesse Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260, 285 (1968); Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817, 844 (1984); McConnell & Posner, 56 U. CHI. L. REV. at 24; Paulsen, 61 NOTRE DAME L. REV. at 359. Government aid to private religious schools is merely a modest attempt to readjust the tax burden of education costs between those parents who desire a public secular education for their children, and those who desire a religious education but are compelled through taxation to pay for the public education their children do not use. Johnson, 72 CALIF. L. REV. at 822; Paulsen, 61 NOTRE DAME L. REV. at 356, 358 & n.210. Genuine neutrality between religious schools and public schools — between "religion and nonreligion" — requires that religious schools be apportioned a share of educational tax dollars reflecting the secular value of the education they supply. If most schools receive government aid, then religiously neutral funding requires that religious schools be eligible to receive it as well. Giannella, 81 HARV. L. REV. at 572, 575; Johnson, 72 CALIF. L. REV. at 845.

Administrative entanglement, however, functions to prevent religious schools from receiving most forms of direct aid from the government, by making it impossible for direct aid to satisfy the *Lemon* test. If government aid comes without any monitoring procedures to ensure that the aid will not be used to advance the religious mission of the religious school recipients, it will almost certainly be held to violate the primary secular effect prong of *Lemon*. *See, e.g., Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 386 (1985); *Leavitt v. Committee for Pub. Educ.*, 413 U.S.

472, 479-80 (1973). If, on the other hand, a means is provided to guarantee that government aid will not be used to advance the religious mission of the recipients, it will almost certainly be held to constitute excessive administrative entanglement. *See, e.g., Aguilar v. Felton*, 473 U.S. 402 (1985). Although *Regan* and *Wolman* held that direct aid to religious schools is constitutional when the aid does not support and cannot be diverted to the religious mission of the school, "the entanglement prong ensures that in most cases this very showing will result in a violation of the Establishment Clause." FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE 52 (1995). However this state of affairs might be characterized, it is not neutral as between religion and nonreligion.

2. Entanglement exacerbates the tensions between the Free Exercise and Establishment Clauses by placing in question the constitutional legitimacy of exemptions obtained by religious individuals and groups through the political process.

Even as it abandoned the doctrine of judicially mandated exemptions for religion under the Free Exercise Clause, the Court affirmed the constitutionality of permissive exemptions — legislative and administrative exemptions granted to religious individuals and organizations even though the Free Exercise Clause does not require them. *Board of Educ. v. Grumet*, 114 S.Ct. 2481 (1994); *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990); *see also Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (Title VII exemption for religious employers does not violate Establishment Clause). However, taking account of government-imposed burdens on religion unavoidably entangles government with religion; "a government that is not to some extent 'entangled' with religion is one that is indifferent to it." Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 130 (1992); *accord* Donald Gianella,

Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement, 1971 SUP. CT. REV. 147, 171.

The entanglements entailed in crafting permissive exemptions are not trivial. Government officials necessarily must evaluate whether allegedly burdened religious conduct is in fact burdened; whether such conduct, if burdened, is in fact religious; whether such conduct, if religious, is deserving of an exemption from a general law; and whether an exemption for such conduct, even if deserved, is feasible in light of the legitimate goals of the law in question. Just as the need for government assistance may tempt parochial schools to compromise their religious missions to qualify for government assistance, so the need to convince government officials of burden, religiosity, sincerity, and feasibility may tempt any religious person or group to compromise religious beliefs or practices. Yet, if such evaluations by government were to be prohibited by entanglement, exemptions, if not eliminated altogether, would be limited to "long-established churches whose religiosity [is] universally conceded." Jesse Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 682-83 (1980). In that instance, new, unusual, or unpopular churches would find themselves unable to obtain such exemptions at all.

3. Administrative entanglement constitutes discrimination on the basis of religion in violation of the Equal Protection Clause of the Fourteenth Amendment.

Suspicion of government action that classifies on the basis of religion is rooted in the very origins of modern equal protection doctrine. *See United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938) (questioning the validity of the "presumption of constitutionality" in case of "statutes directed at particular religions"). Religious classifications have been subjected to strict

judicial scrutiny and invalidated under both religion clauses. *Church of the Lakumi Babylu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (Free Exercise Clause); *Larson v. Valente*, 456 U.S. 228 (1982) (Establishment Clause); *see also McDaniel v. Paty*, 435 U.S. 618 (1978) (state constitutional provision prohibiting clergy from serving in legislature violates Establishment Clause).

As we have shown, administrative entanglement functions as a *de facto* denial of direct government aid to religious schools, solely because of the religious character of such schools. This denial of direct aid to religious schools may well be necessary to satisfy the compelling governmental interest of avoiding an Establishment Clause violation, if the government were not religiously neutral; that is, if it were to assist some religious schools but not others, or all religious schools, but not private secular and public schools. Such action might be justified for the same reason when aid is given directly to religious schools without controls to assure that it is used only for secular educational purposes. When, however, government financial or in-kind aid is made available to all on a religiously neutral basis under circumstances that ensure that it will not be used to teach or otherwise advance religion, there is no justification for denying to religious schools the equal protection of the laws.[6] As

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[6] *Cf.* Rectors of the Univ. of Va. v. Rosenberger, 115 S.Ct. 2510 (1995) (Establishment Clause does not justify denying evangelical student magazine reimbursement from university student activity fund on the same basis as other student publications); Lamb's Chapel v. Center Moriches School Dist., 508 U.S. 384 (1993) (same with respect to church access to public school facilities on same basis as secular groups); Widmar v. Vincent, 454 U.S. 263 (1981) (same with respect to student bible study and prayer group access to university facilities on the same basis as other student groups); *see also* Westside Comm. School Dist. v. Mergens, 496 U.S. 226 (1990) (upholding Equal Access Act's withholding of federal funds from public schools which deny approval of extra-curricular activities on the basis of their religious content).

Professor (now-Judge) Ripple cogently observed, "the policy considerations of entanglement must, at some point, meet the headwinds of equal protection. . . ." Kenneth F. Ripple, *The Entanglement Test of the Religion Clauses—A Ten Year Assessment*, 27 U.C.L.A. L. REV. 1195, 1205 (1980).

4. Political entanglement violates Establishment Clause neutrality by uniquely depriving religious individuals and groups of political and associational rights protected by the First Amendment.

Numerous scholars have criticized the political entanglement test because it devalues rights of political participation and association when these rights are exercised by religious individuals and groups. *See, e.g.*, Jesse Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 683-84 (1980); Edward McGlynn Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 St. Louis U.L.J. 205, 230-31 (1980); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 346 (1986); Ripple, 27 U.C.L.A. L. REV. at 1226. In the very decision that spawned the entanglement prong, the Court observed that "[a]dherents of particular faiths and individual churches frequently take strong positions on public issues," and insisted that "churches as much as secular bodies and private citizens have that right." *Walz v. Tax Comm'n*, 397 U.S. 664, 670 (1970). Even so strong a proponent of entanglement analysis as Justice Brennan[7] strongly criticized use of political

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[7] *See, e.g.*, Aguilar v. Felton, 473 U.S. 402, 408-14 (1985); Meek v. Pittenger, 421 U.S. 349, 373-84 (1975) (Brennan, J., concurring in part and dissenting in part); Lemon v. Kurtzman, 403 U.S. 602, 648-52 (1971) (opinion of Brennan, J.).

entanglement to deprive religious individuals and groups of fundamental constitutional rights. *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring).

B. To the extent that it invalidates church-state relationships which advance or inhibit religion, entanglement is redundant of the protection of religious voluntarism afforded by purpose and effect.

When invalidated government action violates the entanglement prong, it usually violates the purpose or effect prong as well. Peter Schotten, *The Establishment Clause and Excessive Governmental-Religious Entanglement: The Constitutional Status of Aid to Nonpublic Elementary and Secondary Schools*, 15 WAKE FOREST L. REV. 207, 215 (1979). *Walz* itself described excessive entanglement as merely an effect that inhibits religion. 397 U.S. at 674; *accord* Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 349 (1986); Kenneth F. Ripple, *The Entanglement Test of the Religion Clauses—A Ten Year Assessment*, 27 U.C.L.A. L. REV. 1195, 1197 (1980); *see also Walz*, 397 U.S. at 692-94 (Brennan, J., concurring) (intrusion of state into affairs of churches resulting from taxation of church property would disfavor churches relative to analogous secular nonprofit associations in violation of effects prong). It is therefore unclear what entanglement adds to the analysis already supplied by purpose and effect. *See Aguilar v. Felton*, 473 U.S. 402, 430 (1985) (O'Connor, J., joined by Rehnquist, J., dissenting); *Roemer v. Maryland Bd. Pub. Works*, 426 U.S. 736, 768-69 (1976) (White, J., concurring).

For example, in *Larkin v. Grendel's Den*, 459 U.S. 116 (1982), the Court found that the delegation of municipal licensing authority to churches constituted political entanglement, *id.* at

127, but only after it had found that such delegation impermissibly advanced religion in violation of the effects prong. *Id.* at 125-26. Similarly, *Larson v. Valente*, 456 U.S. 228 (1982), suggested that a religiously discriminatory law constituted political entanglement after it had already determined that the law prescribed an impermissible denominational preference. 456 U.S. 246-55; *see also Board of Educ. v. Grumet*, 114 S.Ct. 2481 (1994) (legislative creation of school district whose boundaries precisely coincided with sectarian religious community held impermissible religious preference). Thus, because "the circumstances that give rise to excessive church-government entanglement also threaten violation of the Court's primary effect test," Peter Schotten, *The Establishment Clause and Excessive Governmental-Religious Entanglement: The Constitutional Status of Aid to Nonpublic Elementary and Secondary Schools*, 15 WAKE FOREST L. REV. 207, 215 (1979), entanglement analysis is often redundant.

C. When it is not redundant, entanglement analysis depends on impressionistic judgments based on hypothetical facts.

The entanglement prong has contributed to the confusion in Establishment Clause jurisprudence in at least two ways. First, as we have explained, entanglement effectively denies most direct government aid to religious elementary and secondary schools on the ground that religion pervades every part of their activities and operations. By contrast, religious colleges and religious social service agencies are considered by the Court to be essentially secular entities. Aid to these entities is subjected to a more relaxed standard of review, with the result that most religious college and social service aid programs have been found not to violate the Establishment Clause. *See* Part I.C *supra*. Thus, "whether a religious group is classified as 'pervasively sectarian' is critical to the subsequent determination whether direct aid to

the group violates the Establishment Clause." FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE 85 (1995).

Despite the critical importance of the pervasive/nonpervasive distinction, the nature of an aid recipient is often not documented by an evidentiary record or the subject of careful scrutiny by the Court. *See, e.g., Aguilar v. Felton*, 473 U.S. 402, 411-12 (1985); *Meek v. Pittenger*, 421 U.S. 349, 366 (1975); *Committee of Public Education v. Nyquist*, 413 U.S. 756, 767 (1973). The Court conclusively presumes that religious elementary and secondary schools are pervasively sectarian, *see e.g., Aguilar*, 473 U.S. at 411-12; *Grand Rapids School District v. Ball*, 473 U.S. 373, 384-85 (1985); *Nyquist*, 413 U.S. at 767-68, while there is a strong presumption that religious colleges and social service agencies, though religiously affiliated, are not pervasively sectarian. *See, e.g., Bowen v. Kendrick*, 487 U.S. 589 (1988); *Aguilar*, 473 U.S. at 411; *Roemer v. Maryland Board of Public Works*, 426 U.S. 736, 758-59 (1976). Social science data and other evidence suggests that both presumptions are inaccurate for large numbers of religious schools and colleges.[8] One commentator has characterized judicial understanding of religious elementary and secondary schools as an outdated description of Roman Catholic parochial schools in the 1950s. Peter Schotten, *The Establishment Clause and Excessive Governmental-Religious Entanglement: The Constitutional Status of Aid to Nonpublic Elementary and Secondary Schools*, 15 WAKE FOREST L. REV. 207, 239-44 (1979). Others have questioned the accuracy of the

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[8] For a detailed review of the data and arguments, see FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE 85-91, 169-74 nn.17-42 (1995).

Court's estimation of the sectarian influence at religious elementary and secondary schools.[9]

There is frequently no evidentiary basis for these presumptions. In *Aguilar* and *Grand Rapids*, for example, the Court feared religious indoctrination of religious school students by state instructional employees, despite the fact that the challenged programs in these cases had been in existence for many years without any evidence of such behavior. *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 386, 388 (1985); *Aguilar v. Felton*, 473 U.S. 402, 428 (1985) (O'Connor, J., dissenting).

Second, when financial aid to religious schools is not accompanied by any means of assuring that it will not be used to advance religion, the Court has often estimated the likely effect of such aid and held the aid unconstitutional if it predicts this effect may advance religion. *See, e.g., Grand Rapids School District v. Ball*, 473 U.S. 373, 386, 397; *Meek v. Pittenger*, 421 U.S. 349, 370 (1975); *Committee for Public Education v. Nyquist*, 413 U.S. 756, 779-80 (1973). In addition, it has often speculated that the sorts of government monitoring necessary to ensure that religion is not advanced would excessively intrude upon the religious aid recipient in violation of the entanglement prong. *See, e.g., Wolman v. Walter*, 433 U.S. 229, 254 (1977); *Meek*, 421 U.S. at 370-72; *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971). In either event, entanglement functions as a prophylactic against situations in which an impermissible purpose or effect

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[9] John Garvey, *Another Way of Looking at School Aid*, 1985 SUP. CT. REV. 61, 77 (arguing that even a very strong sectarian influence is unlikely to have any effect on employees who are paid, supervised, and evaluated by state agencies); William P. Marshall, *'We Know It When We See It': The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 525-26 (1986) (disputing that "providing counseling services in a particular building as opposed to across the street" affects the behavior of school counselors).

might occur. *E.g.*, *id.* at 624-25; *accord* Kenneth F. Ripple, *The Entanglement Test of the Religion Clauses—A Ten Year Assessment*, 27 U.C.L.A. L. REV. 1195, 1200-01, 1208 (1980).

When the Court employs entanglement as a prophylactic rule, it decides the constitutionality of a law "based upon a set of circumstances that does not exist." Gary J. Simson, *The Establishment Clause In the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905, 933 (1987). This is inappropriate in two respects. First, to speculate on the constitutionality of measures that might conceivably be adopted to ensure compliance with the purpose and effect prongs is merely to render an advisory opinion. *Id.* Second, this mode of analysis introduces an unacceptable degree of subjectivity into constitutional adjudication: "The degree of entanglement deemed 'excessive' often appears to be the product of personal judgments about certain religions and their institutions by a decision-maker who may or may not have any real exposure to the particular sect in question." Ripple, 27 U.C.L.A. L. REV. at 1218.

III. THIS CASE ILLUSTRATES THE DANGER AND REDUNDANCY OF APPLYING ENTANGLEMENT AS A DISTINCT TEST OF CONSTITUTIONALITY UNDER THE ESTABLISHMENT CLAUSE.

The immediate result of the Court's holding in *Aguilar v. Felton*, 473 U.S. 402 (1985), is that large numbers of educationally disadvantaged children were denied the benefits of a program of remedial assistance solely because they were attending religious schools. *Id.* at 419 (Burger, C.J. dissenting); *id.* at 431 (O'Connor, J. dissenting). The secular purpose of the assistance was undisputed, *id.* at 423 (O'Connor, J. dissenting), and the system of monitoring put in place by the state ensured that the assistance was not used to teach religion. The program failed

merely because the Court deemed this monitoring an excessive entanglement. *See, id.* at 409, 412-13.

That outcome cannot be squared with the neutrality principle. It is *not* religiously neutral to deprive children of secular educational benefits to which they are otherwise entitled, solely because they choose to attend private religious rather than secular public schools. For educationally disadvantaged children, the denial of these benefits constitutes a penalty on their decision to seek a religious education — a penalty that doubtless will influence at least some of them to return to public schools in order to recover those benefits. Entanglement thus has the indisputable effect of *undermining* religious voluntarism. The denial of benefits predicated on the religious character of the school the recipients attend constitutes a religious classification. In the clear presence of both a secular purpose and a primarily secular effect, that result cannot be justified as necessary to avoid a violation of the Establishment Clause. The instant case thus presents a stark illustration of the analytical bankruptcy of entanglement. In short, entanglement should be discarded as an element of Establishment Clause adjudication.

CONCLUSION

The judgment of the Second Circuit should be reversed.

Respectfully submitted,

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